



IP Literature Watch

CRA Charles River
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April 2020

COVID-19 IP Issues

The COVID-19 pandemic and the challenge for innovation policy

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Northern Ireland Legal Quarterly 71(1), Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576481

This brief note considers calls for a Grand Prize to incentivise research into a vaccine for COVID-19. These calls respond to perceived failures of the patent system. We argue that such a prize is probably unnecessary and that the challenge for innovation policy posed by threats like COVID-19 lies elsewhere. In particular, we suggest that the more expansive reward-style approach embraced by Britain in the 18th and 19th Centuries is a more useful starting point for thinking about how to move towards a proactive innovation system.

Crisis-critical intellectual property: Findings from the COVID-19

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569282

Within national and international innovation systems a pandemic calls for large-scale action by many actors across sectors, in order to mobilise resources, developing and manufacturing Crisis-Critical Products as efficiently and in the huge quantities needed. Nowadays, this also includes digital innovations ranging from complex epidemiological models, artificial intelligence (AI) methodologies, to open data platforms for prevention, diagnostic and treatment.

Amongst the many challenges during a pandemic, innovation stakeholders and manufacturing firms particularly find themselves suddenly engaged in new relationships, possibly even with firms that have been competitors prior to the pandemic. Those stakeholders are thus likely to face intellectual property (IP) related challenges. Unfortunately, to (governmental) decision makers these challenges might not appear to be of paramount urgency compared to the many, huge operational challenges to deploy urgently needed resources. However, if IP challenges are considered too late, they may cause delays to urgently mobilising resources effectively. Manufacturing firms could be reluctant to fully engage in the development and mass manufacturing of CrisisCritical Products.

This paper adopts an IP perspective on the currently unfolding COVID-19 pandemic to identify pandemic related IP considerations and IP challenges. The focus is predominantly on individual challenges and technical aspects related to research, development and urgent upscaling of capacity to manufacture Crisis-Critical Products in the huge volumes suddenly in demand. Its purpose is to provide a structure for those concerned with steering clear of IP challenges to avoid delays in fighting a pandemic.

From an ad-hoc patent analysis we identify that the majority of coronavirus related patents in the field are around organic chemistry, and development of methodologies and drugs for prevention, diagnosis and treatment of viruses. We also identify a time-lag between the outbreak and the materialisation of patent applications, which is consistent with the processes of the Patent Office. The large number of references to non-patent literature published after outbreaks is also an indication of the urgency of scientists to put the information in the public domain and make them accessible quickly to a wider audience.

We identify four stakeholder groups that are particularly concerned with IP related challenges during a pandemic. These include (i) governments, (ii) organisations owning existing CrisisCritical IP (incumbents in Crisis-Critical Sectors), (iii) manufacturing firms from other sectors normally not producing Crisis-Critical Products suddenly rushing into Crisis-Critical Sectors to support the manufacturing of Crisis-Critical Products (new entrants) in the quantities that far exceed incumbents' production capacities and (iv) voluntary grassroot initiatives that are formed during a pandemic, often by highly skilled engineers and scientists to contribute to the development and dissemination of Crisis-Critical Products.

This paper discusses IP challenges faced by those stakeholders during a pandemic related to the development and manufacturing of technologies and products for (i) prevention (of spread), (ii) diagnosis of infected patients and (iii) the development of treatments. We offer an initial discussion of potential response measures to reduce IP associated risks among industrial stakeholders during a pandemic.

IP & Antitrust

Is biopharma ready for the standards wars?

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Texas A&M Journal of Property Law (2020, Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550523

This symposium contribution sheds new light on *Momenta v. Amphastar*, a recent federal case in which issues relating to standardization and patent disclosure that have previously been observed in the semiconductor, computing and telecommunications sectors found their way into a dispute between two biosimilar manufacturers. One such manufacturer, Momenta, participated in the development of a standard for testing the purity of generic enoxaparin under the auspices of the United States Pharmacopeial Convention, but failed to disclose that it had applied for a patent on the testing method. When Momenta later sued Amphastar for infringement based on its use of that testing method, Amphastar raised defenses of waiver and equitable estoppel, then brought antitrust claims against Momenta and its distribution partner Sandoz. Amphastar prevailed at the district court on all three theories, obtaining a ruling that Momenta's patent was unenforceable. This case demonstrates that issues surrounding the acquisition and disclosure of patents on standardized technologies have more salience in the biopharma sector than commonly believed. As such, standards organizations operating in this sector should ensure that their policies and procedures are robust enough to delineate clearly the obligations of participants with respect to patents covering standardized technologies, and organizations

that participate in biopharma standards-development should heed the valuable lessons offered by more than three decades of litigation and policy making in the technology sector.

IP & Licensing

SEP licensing after two decades of legal wrangling: Some issues solved, many still to address

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547891

This paper explores where we stand after two decades of European Commission investigations, substantial patent litigation in national courts, and a major judgement of the Court of Justice of the European Union devoted to SEP licensing and its relationship with EU competition law. As will be seen, while consensus has been reached over several issues, a lot remains to be done. This paper is divided in four parts. Part II describes the issues that have been addressed, albeit not always satisfactorily, by competition authorities and courts over the past years. Part III discusses some of the SEP licensing issues that still largely need to be solved with a focus on six questions: (i) what is the nature of the FRAND commitment?; (ii) what is a FRAND license?; (iii) should the gaps left by the CJEU in *Huawei v. ZTE* be filled and if so how?; (iv) can a court that finds that local SEPs have been infringed force the infringer to take a global license on pain of an injunction?; (v) access for all v. license to all: What are the obligations of the SEP holder?; and (vi) how should SEP licensing adapt the IoT context? Part IV concludes.

Does Alice target patent trolls?

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561252

The Supreme Court upended the patent world in the past decade with a series of decisions restricting the scope of patent-eligible subject matter. The culmination of those cases – *Alice v. CLS Bank* -- has been at the center of a firestorm of controversy in the five years since it was decided. AAs we show in this paper, it has also been the basis of nearly a thousand court decisions.

We evaluate how *Alice* and similar Supreme Court decisions on patentable subject matter have been used in the courts five years in. Using a comprehensive dataset we hand-coded of every district court decision and subsequent appeals to the Federal Circuit involving patentable subject matter, we explore not only how patent owners fare in patentable subject matter cases but how a variety of factors, including industry, the nature of the patent owner, and the judicial venue may influence those results. While we confirm some conventional wisdom, we upend other assumptions common in the legal and policy debates over patent eligible subject matter. In particular, we find that once in court, biotech/life science innovations are more likely to survive patentable subject matter challenges than software/IT innovations. Most surprisingly we find that the entities most likely to lose their patents at this stage are not patent trolls but individual inventors and inventor-started companies. Our findings have important implications for current legislative and judicial disputes over patent reform. As biotech worries about deterrence of new innovation and software worries about patent trolls dominate the debates, we may be ignoring some of the most important effects of *Alice*.

IP & Litigation

Judging patents

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William & Mary Law Review, Vol. XX, No. XX, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554411

Patent litigation is regarded as the “neurosurgery of litigation.” To adjudicate these cases, judges must grasp complex technology underlying the claims at issue, notwithstanding the fact that they lack science or technology backgrounds. This problem is compounded by the fact that they generally lack access to neutral expertise, forcing them to rely upon party-hired experts for tutorials. By contrast, several European patent courts utilize technically-qualified judges who work side-by-side with their legally-trained counterparts to decide patent cases. The integration of technical expertise into the judiciary improves the speed of litigation, provides the court with unbiased information, and likely increases the accuracy of the court’s claim construction. This Article examines the role of technical expertise in patent litigation and discusses obstacles to U.S. district courts obtaining assistance. It then looks at the use of technically-qualified judges in the German and Swiss federal patent court systems, as well as in the European Union’s proposed Unified Patent Court, and it discusses advantages and disadvantages to their use. The Article finally makes several proposals for how greater technical expertise could be integrated into the U.S. judiciary, such as through the use of technically-trained magistrate judges.

The secret world of design patents

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Alabama Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551668

High-profile design patent litigation between Apple and Samsung has made headlines in the last few years. Not surprisingly, thereafter, design patents and related litigation have risen exponentially, and have become more important to the economy. Design patents provide legal protection for aesthetic and ornamental aspects of a manufactured product. While there is a rich and longstanding empirical literature and a crucial understanding about many facets of utility patent litigation, almost nothing is known about the design patent litigation world. This article fills that void. By building a novel and comprehensive database of all lawsuits alleging design patent infringement from 2000 to 2016, this article reports the results of a broad empirical exploration of design patent litigation, while giving an overview of the design patent litigation process.

The study reveals that while utility and design patent litigation look similar at first glance, they are actually very different in several important respects. First, we find that unlike utility litigation, which almost always often involves a large company, almost half of design patent litigation involves small or medium-sized companies as both plaintiffs and defendants. Second, the amount of design patent litigation has continuously increased over the last decade, whereas utility patent infringement lawsuits sharply increased and then dipped over the same period. Third, design patent plaintiffs tend to file cases in different districts than utility patent plaintiffs. Namely, we find that design patent asserters did not participate in the flood of litigation in the Eastern District of Texas. Finally, design patent plaintiffs are almost all practicing entities who manufacture products rather than non-practicing entities (so-called “trolls”). These empirical findings have important implications for the law of design patents. While the courts treat utility and design patent litigation as similar for many purposes, including understanding the doctrine and managing the docket, the actual litigation on the ground is starkly different.

Bargaining over royalties in the shadow of litigation

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548049

We model negotiations over patent royalties in the shadow of litigation through a Nash-in-Nash approach, where outside options, triggered in case of disagreement, are derived from a subsequent game of litigation. The outcome of litigation depends both on “hard determinants”, such as relative patent strength, and on “soft determinants”, such as parties’ efficacy in litigation or their (known) preparedness to disrupt negotiations in favor of litigation. Amongst other things, this has implications for the interpretation of observed royalties in empirical analysis.

IP & Innovation

Corporate innovation in the cyber age

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559386

We construct and validate a text-based metric capturing firms’ ex-ante exposure to cybersecurity risk, and we document that the rise of cyber threats is redesigning corporate innovation strategies. As firms’ exposure to cybersecurity risk increases, managers’ reliance on the trade-secrets decline, as they seek to protect their firm’s intellectual capital under patent and intellectual property laws. Besides increasing their patenting activity, we document that firms exposed to cyber threats file for simpler patents to fasten their innovation cycle. Finally, we show that this strategic adjustment is not costless, as it causes firms’ returns to R&D investments to decline significantly.

“Patent tigers” and global innovation (2020 update)

Jonathan Barnett (University of Southern California Gould School of Law)

42 Regulation 14-18 (Winter 2019-2020)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574794

This short contribution updates through 2018 the author’s prior empirical study on global innovation trends as indicated by USPTO patenting data during 1965-2015. The principal trends identified previously have largely continued, with the exception of a slight universal decline in annual patenting volume in 2018. First, non-U.S. inventors continued to receive a slight majority (53% as of 2018) of all utility patents issued annually at the USPTO, with East Asia representing the largest regional group. Second, when normalized to adjust for population size, three smaller countries continue to outperform in terms of annually issued utility patents: as of 2018, Israel, Taiwan and South Korea occupied the first, second and fourth positions on a per capita basis. Third, these same countries continue to occupy leading positions internationally in terms of several standard innovation metrics, including (among other indicators) total R&D spending as a percentage of GDP. Robust investment in intellectual and human capital, together with other qualitative factors, suggest that these countries’ high patenting output principally reflects significant innovation inputs, rather than non-innovation-related strategic objectives.

The research patent

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Vanderbilt Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564732

The patent system gives the courts discretion to tailor patentability standards flexibly across technologies to provide optimal incentives for innovation. For chemical inventions, the courts deem them unpatentable if the chemical lacks a practical, non-research-based use at the time patent protection is sought. The fear is that an early-stage patent on a research input would confer too much control over yet-unknown uses for the chemical; thereby potentially hindering downstream innovation. Yet, denying patents on research inputs can frustrate patent law's broad goal to protect and promote advances in science and technology.

This Article addresses this problem by proposing a new form of intellectual property—a “research patent.” This regime would allow inventors to obtain patents on research inputs and extract their full value through licensing and enforcement. Research patents would impose minimal administrative costs on the patent system and ultimately promote the disclosure, development, and use of early-stage inventions. At a broader level, the proposed regime raises the theoretical question of how allowing patent protection on early-stage inventions like research inputs serves patent law's instrumental justification of promoting scientific progress. It also raises significant normative and policy questions about technology-specific patentability standards and their role in furthering the goals of the patent system.

Drugs, patents, and well-being

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Washington University of Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565320

The ultimate end of patent law must be to spur innovations that improve human welfare — innovations that make people better off. But firms will only invest resources in developing patentable inventions that will allow them to make money — that is, inventions that people will want to use and buy. This can gravely distort the types of incentives that firms face and the types of inventions they pursue. Nowhere is this truer than in the pharmaceutical field. There is by now substantial evidence that treatments for diseases that primarily afflict poorer people — including the citizens of developing nations — are dramatically under-produced, compared with drugs that treat diseases that afflict the wealthy. In addition, the pharmaceutical markets are rife with “me too” drugs — drugs that treat diseases or conditions for which successful medications already exist.

This state of affairs is not inevitable. In recent years, medical and psychological research on well-being has created the capacity for policymakers to draw direct links between patents and human welfare. Armed with this information, policymakers have, for the first time, the power to use the patent system to directly incentivize welfare-enhancing innovations. In this Article, we propose a system of extended patent terms for drug inventions that have a substantial impact on human welfare. We further propose that policymakers lift many of the legal protections for patents that have an insubstantial effect on human welfare — which we term “futility patents” — making those patents easier to challenge and invalidate. The result would be a reorientation of pharmaceutical firm incentives toward drugs that will have a significant impact on welfare, particularly for poorer and underserved populations, and away from drugs that are profitable but do little to improve human life.

IP Law & Policy

The eleventh auer: The effect of *Kisor v. Wilkie* on rulemaking procedures at the US Patent and Trademark Office

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Chicago-Kent Journal of Intellectual Property, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555561

Courts have long deferred to an agency's interpretation of an ambiguous rule or statute, in light of the agency's relevant technical expertise. But some judges prefer to keep legal interpretations in Article III courts, and deferring often involves relying on an agency's interpretation of a genuinely ambiguous statute — the oft-discussed Chevron deference doctrine. This Article analyzes the more nuanced Auer deference, where a court defers to an agency's interpretation of its own ambiguous rule or regulation. Recently, the Supreme Court took and decided *Kisor v. Wilkie*, which dramatically modified the Auer doctrine. While *Kisor* appealed a claim for veteran's benefits that implicated the courts' ability to review Department of Veterans Affairs (VA) findings, the Court took it up to answer a bigger question: Should Auer be overruled?

They did not overrule it — but just barely — dramatically limiting the times and ways in which courts will defer. *Kisor* will have far-reaching effects on all agencies. This Article discusses just one: the United States Patent and Trademark Office (USPTO). Like other agencies, the USPTO issues rules, regulations, and guidance and has adjudicators — here Administrative Patent Judges (APJs) — who preside over disputes at the Patent Trial and Appeal Board (PTAB). But the USPTO is unique in that, in granting patents, it grants hundreds of thousands of legal causes of action annually, namely the ability to exclude others from making, using, or selling a patented invention, many leading to dispute.

Intellectual property and extra-contractual liability

Giancarlo Frosio (Université de Strasbourg – CEIPI; Stanford University - Stanford Law School Center for Internet and Society)

in *HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: METHODS, LENSES, AND PERSPECTIVES* (Irene Calboli and Lilla Montagnani, eds., OUP, 2020 Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552126

This Chapter discusses intellectual property and extra-contractual liability by highlighting general comparative analysis issues within civil and common law systems, with some consideration given also to major theoretical clusters that might influence the different legal regimes. The Chapter focuses on emerging issues of extra-contractual liability for intellectual property infringement in the platform economy, with special emphasis on copyright and trademark infringement, seeking to coordinate miscellaneous approaches from the United States, the European Union and selected European countries' experiences. In doing so, this Chapter highlights research and methodological issues related to limited harmonization at a regional level in secondary and extra-contractual liability doctrines when applied to IP. Finally, this Chapter describes the World Intermediary Liability Maps (WILMap) as an attempt to provide consistency within a fragmented research framework while also presenting other miscellaneous endeavours seeking the same goal.

IP & Trade

International patent protection and trade: Transaction-level evidence

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562618

This paper investigates the extent to which international trade hinges on patents. We analyze the export and patenting activities of the universe of French exporting firms over the period 2002–2011. The noticeable feature of our study is that we observe export and patenting activities worldwide and at the product level. We exploit how heterogeneity of patent coverage across (and within) product-country relates to exports. We find a patent premium of at least 10 percent, which is mainly associated with a quantity effect. A modest price effect emerges in specific sectors, notably pharmaceuticals.

Settlement of international intellectual property disputes

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NALC Law Journal, Volume 1, Number 2, ISSN No: 2467-916X, National Law College, Lalitpur, Nepal, 103-116 (2020).

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541611

World Intellectual Property Organization (WIPO), which administers some twenty six sets of multilateral treaties on intellectual property (IP) law including the Paris and Berne Conventions, is the global organization to regulate the intellectual property rights (IPRs). Besides WIPO-administered treaties, the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) during the Uruguay Round as an international legal agreement between all the member nations of the World Trade Organization (WTO) has posited the WTO as one more global authority on IPRs. This article sheds light on the dispute settlement regime within the international intellectual property law administered by both WIPO and WTO.

LDCs along with the developing and developed ones must have the opportunity to secure their legitimate business interests, curb unfair practices and cope with unlawful restrictions through timely and effective dispute resolution. Nevertheless, the DSMs under international IP law are yet to be proven efficacious and convenient enough for the LDCs and developing countries to negotiate their odds with larger economies or counterparts. This article critically examines the existing dispute settlement rules, procedures and structures within the framework of major international IP law especially relating to WIPO and TRIPS in light of making accessible fair, equitable and just international economic legal system to the LDCs on par with other economies. To identify major constraints on proper access of LDCs and developing countries to dispute settlement mechanism (DSM) within international IP law, the study concentrates on the analysis of dispute settlement provisions in IP law instruments formulated under the auspices WIPO and TRIPS Agreement within WTO.

Copyright and Trademark Law

Fake trademark specimens: An empirical analysis

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Columbia Law Review Forum, Vol. 121, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556121

This Article reports the results of new empirical work showing that an appreciable number of U.S. trademark applications originating in China include fraudulent specimens of use, despite the law's requirement that these marks be used in U.S. commerce to proceed to registration. In particular, with respect to use-based applications originating in China that were filed at the U.S. Patent and Trademark Office (PTO) in 2017 solely for apparel goods, we estimate that 66.9% of such applications included fraudulent specimens. Yet 59.8% of these fraudulent applications proceeded to publication and then 38.9% proceeded to registration. If these applications are representative of the overall population of Chinese-origin applications in that year, then approximately 14.0% of the total use-based applications filed in 2017 were fraudulent. Fraudulent registrations worsen the problems of trademark depletion and clutter, undermine the integrity of the trademark register, and hurt legitimate businesses that would like to use these marks. We therefore recommend legislative action to make it easier for third parties and the PTO to cull these marks from the register and systematic improvement by the PTO to ensure that applications with fraudulent specimens are not registered in the first instance.

TRIPS in the field of copyright

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The First 25 Years of the TRIPS Agreement in Context (Christopher Heath & Anselm Kamperman Sanders eds., 2021 Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569284

This chapter reviews the copyright law-specific contributions of TRIPS, including its substantive copyright law provisions and the interpretations that WTO panel reports have provided for some of the provisions. The chapter further explores how copyright law has developed outside of TRIPS; it focuses on international copyright law negotiations that resulted in the conclusion of WIPO treaties and on other international negotiations that led to the conclusion of numerous free trade agreements. Finally, the chapter offers an outlook on the current copyright law landscape; it presents the structural and substantive issues that have arisen in the landscape since the TRIPS negotiations and suggests the paths that international copyright law might take in the future.

Monetizing infringement

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UC Davis Law Review, Vol. 54, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553453

The deterrence of copyright infringement and the evils of piracy have long been an axiomatic focus of both legislators and scholars. The conventional view is that infringement must be curbed and/or punished in order for copyright to fulfill its purported goals of incentivizing creation and ensuring access to works. This Essay proves this view false by demonstrating that some rightsholders don't merely tolerate, but actually encourage infringement, both explicitly and implicitly, in a variety of different situations and for one common reason: they benefit from it. Rightsholders' ability to monetize infringement destabilizes long-held but problematic assumptions about both rightsholder preferences, and about copyright's optimal infringement policy.

Through a series of case studies, this Essay describes the impetuses and normative implications of this counterintuitive—but not so unusual—phenomenon. Recognition of monetized infringement in copyright is interesting not only for its unexpectedness, but also for the broader point that its existence suggests: we have an impoverished descriptive account of why some laws operate the way that they do. This is particularly unsettling in an area like copyright, where advocates are sharply divided along policy lines. This Essay is an important first step toward a positive theory of copyright—one that recognizes the underappreciated role, both positive and negative, that private parties play in policymaking.

Other IP Topics

US intellectual property and counterfeit goods—Landscape review of existing/emerging research

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USPTO Economic Working Paper No. 2020-03

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577710

This report provides an overview of the international market for counterfeit goods. Specifically, the report details the overall magnitude of international counterfeit trade, and explains how counterfeit goods affect the U.S. economy. It highlights the role of the private sector in combatting counterfeits, and the rising trend of counterfeit trade via small parcels. Last, it reviews trends in consumer attitudes towards counterfeit goods, and assesses the facilitating role of social media.

Quantum patents

Brian S. Haney (Independent)

Brian S. Haney, *Quantum Patents*, 27 *B.U. J. Sci. & Tech. L.* __ (2020). (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554925

Quantum Patents are patents with claims relating to quantum computing. The number of Quantum Patents granted by the USPTO is rapidly increasing each year and in total market volume. Yet, while the literature on technology patents is visibly scaling – the literature specifically focused on Quantum Patents is non-existent. Thus, this Article draws on a growing body of quantum computing, intellectual property, and technology law scholarship to provide novel Quantum Patent analysis and critique.

In short, this Article contributes the first empirical Quantum Patent review, including novel technology descriptions, market modeling, and legal analysis relating to Quantum Patent claims. First, this Article discusses the two main technical approaches to Quantum Computing. The discussion explores the relationship between Adiabatic Quantum Computers and Gate-Model Quantum Computers, as well as various quantum software frameworks. Second, this Article models an evolving Quantum Patent data-set, offering economic insights, claims analysis, and patent valuation strategies. The data models provide insight into an uncharted patent market alcove, shining light on a completely new economy.

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